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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	4
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978)	7
Burch v. Louisiana, 444 U.S. 130 (1979)	17
Brooks v. Labor Board, 348 U.S. 96 (1954)	*passim*
Celanese Corp., 95 NLRB 664 (1951)	10
Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992)	19
Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987)	13, 15, 19
Garment Workers v. Labor Board, 366 U.S. 731 (1961)	9, 18, 19
Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *enf'd as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914	9
Linden Lumber Division, 190 NLRB 718 (1971), *rev'd*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd*, 419 U.S. 301 (1974)	10
Linden Lumber Divison v. NLRB, 419 U.S. 301 (1974)	10, 12
Moisi & Son Trucking, 197 NLRB 198 (1972)	19
NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990)	5, 6, 7, 16
NLRB v. Financial Institution Employees, 475 U.S. 192 (1981)	14, 15, 19
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	11
Terrell Machine Co., 173 NLRB 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S. 929	5
United States Gypsum Co., 157 NLRB 652 (1966)	8
United States Gypsum Co., 90 NLRB 964 (1950)	10

STATUTES

National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.*	
§ 8(a)(5)	*passim*
§ 9(a)	7
§ 9(c)(1)	8

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

	Page
S. Rep. 105, 80th Cong. 1st Sess. (1947)	13
H.R. Conf. Rep. 510, 80th Cong. 1st Sess. (1947)	13
Brief of the NLRB General Counsel in *Lee Lumber and Building Material Corp.*, (NLRB) Case 13-CA-29377	6

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions representing approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

A. The ultimate question raised by the complaint that gives rise to this case is whether petitioner breached its duty to bargain imposed by § 8(a)(5) of the National Labor Relations Act by withdrawing recognition and

ceasing to bargain with the union that had been certified by the National Labor Relations Board as the exclusive representative of petitioner's employees. Petitioner claims that it was privileged to so act because of a professed "good faith doubt" as to the Union's majority status.

The Court has expressly reserved decision whether the NLRA creates such a unilateral employer privilege. And, that question is now *sub judice* before the Board itself.

Against this background, and in the absence of a challenge by either party to the Board's "good faith doubt" rule, the starting point here is to *assume*, without deciding, that at certain times employers are privileged to terminate their duty to recognize and bargain with an exclusive representative based upon a good faith doubt of the union's majority status. On that assumption, the question becomes whether the NLRB erred in holding that this privilege may not be exercised after an employer's offer for a new collective bargaining agreement is accepted by the union. Pp. 4-7 *infra*.

B. By its terms, the NLRA creates an unqualified, and unlimited, obligation on an employer to bargain collectively with the representative "designated or selected . . . by the majority" of the employees in an appropriate bargaining unit. The Act also provides a direct route through which an employer who questions whether a union continues to enjoy majority support can secure an NLRB-conducted representation election to test employee desire for continued representation, as well as a procedure through which disaffected employees can initiate such an election. These are the only means set out in the Act through which the continuing employer duty to bargain may be terminated.

Furthermore, in the initial recognition setting, the NLRB has held, with the approval of this Court, that the NLRB representation election procedure is so superior a means of ascertaining employee sentiment that an employer may refuse to accord initial recognition to a union

which, on every objective basis, has demonstrated majority support but which has not obtained an NLRB certification. The considerations that led the Board to accord such primacy to the representation election procedure apply equally where questions arise as to an incumbent union's continuing majority status.

For all these reasons, the NLRB is, at the very least, free to require a representation election vote as the basis for a lawful employer termination of a duly-recognized union's status as the exclusive representative. The NLRB's current doctrine extending to employers the broader legal privilege to cease bargaining based upon a good faith doubt of majority employer support is, at most, a permissible exercise of the Board's administrative discretion. Pp. 7-12 *infra*.

C. The remaining question is whether the Board abused its discretion in holding that the privilege to withdraw recognition based upon a good faith doubt ends when a union accepts a contract offer.

If the only value expressed in the Act were assuring that at every moment in time an exclusive representative enjoys the support of the majority of the employees in the bargaining unit, there would be no need or justification for any temporal limits on when a union's majority status may be questioned. But the Act's ultimate aim is industrial peace, and towards that end the Board, with Congressional approval, has developed a set of rules which define time periods when a union's majority support is conclusively presumed and not subject to challenge, and other time periods when the presumption of continuing majority support is open to challenge.

The temporal limitation at issue here is of a piece with these rules. When an offer is accepted and a contract formed, the policies favoring industrial peace, stability and repose are at their strongest. Moreover, if employers were free to wait until negotiations conclude and an agreement reached before deciding whether to assert a

good faith doubt, such doubts could be asserted for tactical reasons wholly unrelated to protecting employee free choice.

The Board's rule leaves ample opportunity for an employer with a reasonable, good faith doubt of the union's continuing majority support to act on that doubt either by petitioning for a representation election or by withdrawing recognition. The Board's rule allows disaffected employees at least the same, ample opportunity to petition for an election. And the Board has expressly left open the door to testing employee sentiment even after a union accepts the employer's offer through means other than the assertion of a good faith doubt.

All that the Board has ruled here, in the interest of industrial stability and good faith negotiations, is that after a contract is formed the time for one avenue of testing union majority support—the avenue which is least accurate because focused on the reasonableness of employer perceptions of circumstantial evidence—has come to an end. That is a rational and defensible exercise of the Board's discretionary authority. Pp. 12-19 *infra*.

ARGUMENT

A. The ultimate question raised by the complaint that gives rise to this case is whether petitioner Auciello Iron Works ("the Company") breached its duty to bargain imposed by § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), as amended ("NLRA" or "the Act"). On its face, the answer to that question is self-evidently "yes."

The National Labor Relations Board ("NLRB" or "the Board"), acting pursuant to § 9 of the Act, conducted an NLRA representation election among the Company's employees in which a majority voted for representation by Shopmen's Local 501, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO ("the Union"). The NLRB, in accordance with the

Act, thereupon certified the Union as the exclusive bargaining representative of the Company's employees. As a result, under § 8(a)(5) of the Act, the Company became obligated to bargain collectively with the Union.

In the face of all this, on November 20, 1988, Auciello notified the Union that the Company "disavows any obligation to carry on further negotiations," and since that date the Company, as it states in its brief, has ceased to "recognize the Union as the exclusive bargaining representative of the employees," Resp. Br. at 7.

The Company's refusal to continue to recognize and bargain with the Union was not predicated on a second Board-conducted election, a resulting employee vote against union representation, and NLRB decertification of the Union as the representative of the Company's employees. Indeed Auciello never sought to invoke the NLRA's representation election procedures.

Nor has the Company sought to defend its action—as current Board law would allow—on the ground that the Union, *in fact*, no longer had the support of the majority of Auciello's employees at the time the Company withdrew recognition.[1]

Instead, as it does in this Court, the Company has sought to justify its refusal to continue to recognize the Union on the basis of a professed "good faith doubt" as to the Union's majority status. Under the good faith doubt rule, as reaffirmed by the Board in this case, "an employer need not show an actual numerical loss of majority support and may rely instead on circumstantial evidence to satisfy its burden of proof." 317 NLRB at 365 n.14; *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788 n.8 (1990) (same).

It is far from clear that the NLRA creates a unilateral employer privilege—based upon the employer's doubts

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[1] *Terrell Machine Co.*, 173 NLRB 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S. 929.

concerning the employees' desires—to terminate the continuing statutory duty to recognize and bargain with a union duly designated by the employees as their exclusive representative. In *Curtin Matheson,* 494 U.S. at 788 n.8, this Court specifically "declined to address that issue" as both parties in that case assumed the existence of such an employer privilege and it was challenged only by the AFL-CIO as *amicus curiae.* That question is now *sub judice* before the Board itself.[2]

Against this background, and in the absence of a challenge by either party to this proceeding to the Board's current "good faith doubt" rule, here as in *Curtin Matheson,* the starting point is to *assume,* without deciding, that at certain times employers are privileged to terminate their duty to recognize and bargain with an exclusive representative based upon the employer's good faith doubt of the union's majority support. On that assumption, the question becomes whether the NLRB erred in holding that this privilege may not be exercised in the period after an employer's offer for a new collective bargaining agreement is accepted by the union. As we proceed to show, that sub-rule represents a lawful exercise of the Board's authority.

Our analysis proceeds as follows. We first show that the "good faith doubt" rule is a creature of the NLRB's

[2] In *Lee Lumber and Building Material Corp.,* (NLRB) Case 13-CA-29377, the General Counsel of the NLRB has urged the Board to "adopt the following rule":

> No employer may lawfully withdraw recognition from a certified bargaining representative unless, at a time when the employer is still honoring its bargaining obligation, a majority of the employees reject union representation in a secret ballot election conducted at an appropriate time and on the basis of a 30% showing of interest. [General Counsel Br. at 20-21]

Lee Lumber was not called to this Court's attention in either the petition for *certiorari* or the brief in opposition. In light of the pendency of that case before the NLRB, the resolution of which could make the instant case purely academic, the Court may wish to reconsider its decision to grant a writ of *certiorari* here.

administrative discretion, rather than a creature of the Act itself. Nothing in the NLRA *requires* recognition of an employer privilege to terminate the duty to recognize and treat with a properly-designated exclusive representative based upon a good faith doubt as to the employees' continued support of the union. That privilege is, at most, the result of a permissible exercise of the Board's "authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 500-01 (1978).

Second, we show that assuming the NLRB is authorized to recognize such an employer privilege to withdraw recognition based upon a "good faith doubt," the Board's authority likewise encompasses discretion to place temporal limitations on when such a good faith doubt can justify a refusal to bargain, at least so long as the limitations are "rational and consistent with the Act," *Curtin Matheson,* 494 U.S. at 787. The sub-rule at issue here easily meets that test.

B. (1) Because the ultimate question in this case concerns the scope of an employer's duty to bargain under NLRA § 8(a)(5), analysis appropriately begins with the language of that section.

By its terms, § 8(a)(5) provides that

> It shall be an unfair labor practice for an employer—
>
> > to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a).

NLRA § 9(a), in turn, provides that

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such employees shall be the exclusive representative of the employees in such unit for the purposes of collective bargaining."

Taken together, then, these two provisions obligate employers to bargain with representatives "designated or selected . . . by the majority" of the employees in appropriate bargaining units.

The NLRA goes on to provide a direct route through which an employer who questions whether a union continues to enjoy majority support can petition for an NLRB-conducted representation election to test employee desire for continued representation, NLRA § 9(c)(1)(B), as well as a procedure through which disaffected employees can petition for such an election, NLRA § 9(c)(1)(A)(ii). In either event, the NLRB is instructed by § 9(c)(1) to "investigate such petition" and, if the Board finds that "a question of representation exists," the Board is to "direct an election by secret ballot." [3]

If, in such an election, a majority of the employees vote against representation by the incumbent union, the NLRB "shall certify the results"; doing so terminates the union's status as the employees' § 9(a) exclusive representative. And, since the § 8(a)(5) duty to bargain is "subject to § 9(a)," an NLRB certification that the union no longer enjoys majority support terminates the employer's bargaining duty as well.

This is the procedure Congress wrote into the Act—and the only procedure set out in terms in the Act—by which the continuing employer duty to recognize and bargain with a union "designated or selected" by the em-

[3] In this context, as in the context of petitions filed in initial recognition situations, the NLRB has developed a set of rules for determining whether a "question of representation" exists and an election should be held. Generally speaking, if a petition is filed by disaffected employees, the NLRB requires a 30% "showing of interest" (the same showing required in the initial recognition setting); if a petition is filed by an employer questioning an incumbent union's continuing majority support, the NLRB requires —in lieu of employee signatures—a demonstration of reason to doubt that the employees continue to desire union representation. *See United States Gypsum Co.*, 157 NLRB 652 (1966).

ployer's employees may be terminated. Nothing in this statutory scheme remotely suggests—let alone mandates—that, once a representative has been so "designated or selected," an employer is free to refuse to bargain based upon the employer's professed doubt as to whether a majority of the employees continue to support union representation.

The entire point of this procedure—indeed, the basic point of the Act—is to create a regime of "freedom of choice and majority rule in *employee* selection of representatives." *Garment Workers v. Labor Board*, 366 U.S. 731, 739 (1961) (emphasis added). Yet the good faith doubt rule, by focusing on the reasonableness of the *employer's* belief as to the *employees'* desires rather than on the *employees'* actual desires, permits majority employee sentiment to be frustrated where the employer's doubt is reasonable but wrong, *viz.*, where the employees in fact still desire union representation despite the employer's doubt. Thus, if anything, the good faith doubt rule runs *against* the grain of the statute rather than being compelled by it.

(2) There is also a tension between the good faith doubt rule and the decisions of the NLRB and of this Court concerning the method by which a union can obtain the status of exclusive representative.

There was a time when the Board was of the view that such means of establishing majority status as signed authorization cards, responses by employees to a poll, or participation by employees in a recognition strike are on a par with a representation election vote. Under this regime, as announced in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enf'd as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914, where an employer had no "bona fide doubt" as to such a showing of majority support by a union seeking recognition, the employer was obligated to recognize and bargain with the

union forthwith and could not insist upon a representation election "in order to gain time within which to undermine the union."

The "good faith doubt" rule as to when an employer lawfully may *withdraw* recognition of an incumbent union originated as a corollary of the *Joy Silk Mills* rule. In *Celanese Corp.*, 95 NLRB 664 (1951), the Board reasoned that good faith doubt should be the test not only for whether an employer's refusal to extend initial recognition to a union claiming majority support is lawful but also for whether an employer's refusal to continue to recognize such a union is lawful.[4]

In *Linden Lumber Division,* 190 NLRB 718, 721 (1971), *rev'd,* 487 F.2d 1099 (D.C. Cir. 1973), *rev'd,* 419 U.S. 301 (1974), the NLRB overturned *Joy Silk Mills* and held that employers may refuse to accord initial recognition to unions which, on every objective basis, have obtained and demonstrated majority support but which have *not* obtained an NLRB certification. The Board's decision adopting this rule was sustained by this Court on appeal. *Linden Lumber Division v. NLRB, supra.*

The *Linden Lumber* rule rests on a complex of considerations. In part it is an expression of the concern—expressed by this Court one year before the Board decided *Linden Lumber*—that such employee actions as participating or refusing to participate in a union-called recognition strike are not sufficiently reliable indicia of the employees' desires on the question of union representation as to form a basis for required union recognition. *NLRB*

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[4] *Celanese Corp.* overturned *United States Gypsum Co.*, 90 NLRB 964 (1950), in which the Board had held that "an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt by filing an employer petition" and that the employer is *not* free to act unilaterally in withdrawing recognition.

v. Gissel Packing Co., 395 U.S. 575, 604-09 (1969). Beyond that, the *Linden Lumber* rule reflects the understanding that a "representation election is a solemn . . . . occasion, conducted under safeguards to voluntary choice," *Brooks v. Labor Board,* 348 U.S. 96, 99 (1954); that other means of decision-making are "not comparable to the privacy and independence of the voting booth," *id.* at 99-100; and that, in consequence, the NLRA representation election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decisions," *Gissel,* 395 U.S. at 602.

The considerations that have led the Board to award such primacy to the representation election procedure apply with equal force where questions arise as to an incumbent union's continuing majority status. Evidence of anti-union sentiment expressed outside of the NLRA representation election system is no less ambiguous or unreliable than evidence of pro-union sentiment. The danger of "group pressure" is no less strong. And, the termination of a bargaining relationship is as weighty a matter as the initiation of such a relationship and thus calls for "a procedure no less solemn than that of the initial designation." *Brooks* 348 U.S. at 99. Thus, the Board's continuing willingness to entertain good faith doubt as the basis for allowing employers to withdraw recognition of a union is difficult to square with *Linden Lumber.*

Indeed, in the withdrawal of recognition context there is at least one additional consideration that militates against according any privilege to employer actions predicated on the employer's stated understanding of the employees' choice on union representation. As *Brooks* recognizes, an employer who questions a union's continuing majority status "[i]n effect . . . seeks to vindicate the rights of his employees to select their bargaining representative." 348 U.S. at 103. But the employer is a suspect champion of employee rights. The employer has obvious interests of his own that have nothing to do with

vindicating employee free choice and everything to do with vindicating the employer's desire to operate non-union.

(3) In sum, *Linden Lumber* teaches that the Board can properly conclude that in order to further the interests in employee free choice and self-determination the employer obligation to accord initial recognition to a union claiming majority support attaches only if the union establishes that majority through a Board-conducted representation election. Given *Linden Lumber*, and given the statutory scheme as outlined above, it follows that the Board, at the very least, is equally free to require a representation election vote as the basis for a lawful employer termination of a duly-recognized union's status as the exclusive representative. The NLRB's current doctrine extending to employers the broader legal privilege to cease bargaining based upon good faith doubt of majority employee support is, then, at most a permissible exercise of the Board's administrative discretion rather than the embodiment of any statutory mandate.

C. Against this background, the question posed here can be restated as follows. Having decided, in the exercise of its discretion, to privilege employers to terminate the duty to bargain with a properly-designated exclusive representative on the employer's good faith doubt of the union's majority support, did the Board abuse its discretion in refusing to extend that privilege to an employer who asserts such a doubt only *after* a union has accepted an outstanding proposal from the employer for a collective bargaining agreement. As we proceed to show, that limitation on the good faith doubt rule is entirely reasonable.

(1) NLRB certifications of a union as an exclusive representative following a Board-conducted representation election are not bounded by a stated expiration date. The Act contains no requirement that an exclusive representative reprove its majority support at defined intervals in order to maintain its status as the representative.

Rather, as we have seen, the Act provides procedures by which a union's majority status can be called into question at the initiative of either the employer or employees, and the Board has added further procedures of its own, including the good faith doubt rule.

If the only value expressed in the Act were to assure that at each and every moment in time an exclusive representative enjoyed the support of the majority of the employes in the bargaining unit, there would be no need—and no justification—for placing any temporal limits on when a union's majority status may be put into question. In such a uni-dimensional world, any moment would be an appropriate one for retesting support for a union.

But the world—and the Act—are more complicated than that. The "underlying purpose of this statute is industrial peace." *Brooks*, 348 U.S. at 103. And, as this Court recognized in *Brooks*, and many times since, that end in turn requires "stability in collective bargaining relationships." *Brooks*, 348 U.S. at 100.

It is in large part for this reason that Congress in 1947 added to the NLRA a provision which makes a union's certification unchallengeable for one year, even where the union, in fact, loses its majority support during the certification year. *See* NLRA § 9(c)(3). And it is for the same reason that the Board, with Congressional approval,[8] has developed a set of rules which define time periods when a union's majority support is conclusively presumed and not subject to challenge, and other time periods when the presumption of continuing majority support is open to challenge. As this Court explained in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-39 (1987), in words on which the Board here relied, 317 NLRB at 367:

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[8] S. Rep. 105, 80th Cong. 1st Sess. at 27 (1947); H.R. Conf. Rep. 510, 80th Cong. 1st Sess. at 50 (1947).

> In essence, [the presumptions] enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. . . . The presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees. . . . The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace.

Plainly then, "as a matter of national labor policy", the Board may "limit the timing of employee[—and a *fortiori*, employer—]challenge to the[] certified bargaining representative's majority status." *NLRB v. Financial Institution Employees*, 475 U.S. 192, 208 (1986).

(2) That being so the dispute in this case reduces to whether the particular limit the Board constructed here—that employer good faith doubt claims asserted after an outstanding contract proposal is accepted and a binding contract is consumated will not be entertained—is a rational limit. For at least two reasons, it is.[6]

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[6] It bears emphasis that the NLRB did *not* purport to rule that acceptance of an offer marks the point at which the contract bar doctrine is triggered so as to preclude the Board from entertaining an employee decertification petition. *Cf.* 317 NLRB at 367 n.26 (distinguishing contract bar rule). The considerations that bear upon whether to grant the request of a group of employees for an election are not necessarily the same as the considerations implicated by an employer's assertion of a good faith doubt. The Board decision here thus does not speak to the contract bar issue.

Similarly, the NLRB went to pains to make clear that it was *not* deciding whether, after acceptance of an offer, an employer may withdraw recognition from the union upon proof of an actual loss of majority support. *See* 317 NLRB at 365-66 n.14, 375 n.74. There, too, the balance may be different than where, as here, the employer asserts nothing more than a doubt as to the majority sentiment.

First, as a general matter, during the term of a (three years or shorter) collective bargaining agreement a union's majority status is not subject to challenge; that is the essence of the contract bar doctrine. And, as the Board stated in its decision here, the general understanding in collective bargaining is that notwithstanding "a rejection or counterproposal," an offer still "remain[s] on the table and [is] capable of acceptance unless the offeror explicitly withdraws it or changed circumstances would lead both parties reasonably to believe that the offer was withdrawn." 317 NLRB at 369 n.34. Acceptance of such an offer thus marks the point at which a contract is formed.

At that point, the policies favoring industrial peace, stability and repose are at their strongest. The union and the employer have reached accord concerning the terms and conditions of employment which will govern the workplace for the term of the new agreement. Any strike activity is over and labor peace is likely to prevail for the term of the contract, given the dispute resolution mechanisms in collective bargaining agreements. The union is then in a position to turn its attention, and the attention of the employees it represents, from the disruptive process of reaching agreement to the healing process of restoring "industrial self-government" under the negotiated agreement. In these circumstances—as in several others in which this Court has refused to allow "an employer . . . presented with evidence that his employees have deserted their certified union . . . forthwith [to] refuse to bargain"—allowing employers "to rely on employees' rights in refusing to bargain . . . is not conducive to [industrial peace], it is inimical to it." *Brooks*, 348 U.S. at 103; *see also Financial Institution Employees*, 475 U.S. at 209; *Fall River Dyeing*, 482 U.S. at 50 n.16.

Second, allowing employers to wait until negotiations are concluded and an agreement reached to decide whether to assert a good faith doubt would invite the possibility that such doubts will be asserted for tactical reasons wholly unrelated to protecting employee free choice. The

employer in a case such as this one can avoid its supposed dilemma simply by withdrawing its contract offer should dissipating employee support for a strike give rise to a reasonable good faith doubt that the employees no longer desire union representation.[7] But allowing such an employer to leave the offer open, while at the same time preserving the option of avoiding the contract once accepted, would also open the door to a contract binding on the union but not on the employer. As the Board put it in its decision here:

> [I]t is inconsistent with the concept of good faith bargaining for the Board to adopt a rule that an employer may continue to bargain—and thus to treat the union as the representative of a majority of its employees—by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt of the union's majority support based on grounds that it knew existed prior to the formation of the contract. [317 NLRB at 369].[8]

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[7] Employee support for the strike and employee support for union representation are, of course, two separate matters. *See Curtin Matheson*, 494 U.S. at 789 (an employee "may disagree with the purpose or strategy of the particular strike and refuse to support that strike, while still wanting that union's representation at the bargaining table").

[8] It is true as well that any rule permitting employer "self-help" in terminating bargaining relationships entails the possibility that an employer will assert a doubt as to union majority status because of the employer's antipathy to the union, rather than out of any concern for employee free choice. That possibility is especially strong in light of the fact that, by engaging in self-help, an employer can count on obtaining a several-year respite from bargaining. *Cf. Brooks*, 348 U.S. at 103. That truth, far from negating the rationality of the Board's present rule as a means of avoiding employer tactical use of the good faith doubt rule, simply casts further doubt on the good faith doubt rule itself. And, for the reasons explored in text, the dangers of a misuse of the good faith doubt rule would be greatly heightened if employers could wait until the end of negotiations to assert such doubts.

It bears emphasis that the limit stated by the Board here in no way threatens employee free choice or majority rule. The Board has left ample opportunity—during the "open period" prior to contract expiration and during any hiatus between contracts—for an employer with a reasonable, good faith doubt of the union's continuing majority support to act on that doubt either by petitioning for a representation election or by withdrawing recognition. The Board's rule, read most narrowly, allows disaffected employees that same ample opportunity to petition for an election. And, the Board has also left leeway for testing employee sentiment even after a union accepts the employer's offer, through means other than the assertion of a good faith doubt. All that the Board has ruled here, in the interest of industrial stability and good faith negotiaitons, is that after a contract is formed the time for one avenue of testing union majority support—the avenue which is least accurate because focused on the reasonableness of employer perceptions of circumstantial evidence—has come to an end.

One final consideration is worthy of note. In the nature of things, any "line drawing process, 'although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.'" *Burch v. Louisiana* 441 U.S. 130, 138 (1979). So here: had the employer withdrawn recognition of the Union one day earlier, the Board would have entertained the employer's assertion of a good faith doubt since under the Board's rule an employer can wait until the moment *before* an offer is accepted to assert such a doubt. But so long as the Board was justified in drawing a temporal line and chose a rational place of demarcation, its decision cannot be deemed to be an abuse of discretion merely because of the inherent degree of arbitrariness in any line.[9]

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[9] For this reason, among others, Auciello's suggestion that the statute requires that an employer have "at least a reasonable period of time to assess its position and to decide the appropriateness of

D. Against the foregoing, Auciello maintains that there *is* a statutory reason why the Board must allow employers to raise a post-contract good faith doubt of majority union support based on pre-contract facts: NLRA § 8(a)(2) as interpreted in *Garment Workers v. Labor Board, supra,* it is said, requires that result. Pet. Br. 36.

Garment Workers held (a) that an employer violates § 8(a)(2) by according initial recognition to, and entering into a collective bargaining agreement with, a union as an exclusive representative, where the employer did not verify the union's majority status and the union did not *in fact* represent a majority on the date recognition was accorded, and (b) that the validity of the recognition can be raised after the contract is consummated. 366 U.S. at 734-35; see 734 n.4 ("the union in fact had authority to represent either 70 employees out of a relevant total of 280, or 158 out of 368, depending upon the criteria used in determining employee eligibility"). Consistent with *Bernhard Altmann*, the Board has held that an employer who has voluntarily recognized a union in the first instance may refuse to bargain with that union

withdrawing recognition from the Union" (Pet. Br. at 31) is unpersuasive. Nothing in the Act or reason require the Board to square the already indefinite concept of good faith doubt by combining it with a "reasonable period of [assessment] time" which is, of course, an indefinite period of time, rather than a definite, ascertainable one.

Moreover, Auciello's entire "reasonable time" argument ignores the fact that the employer, in withdrawing recognition of an incumbent union, is not vindicating any statutory interest of its own, and that insofar as the employer seeks the opportunity to champion the employees' rights, the employer creates its own dilemma in a situation like the instant one by leaving on the table an offer which, by hypothesis, the employer was at liberty to withdraw. In effect, the Company seeks an extention of the privilege to assert a good faith doubt premised on the Company's own inattention to the bargaining process. No statutory provision or policy requires the Board to do so.

on the ground that the union lacked majority support at the time recognition was granted and may do so during periods—such as the initial recognition period—in which a presumption of majority support is not otherwise open to challenge. *See, e.g., Moisi & Son Trucking,* 197 NLRB 198 n.2 (1972).

But, as *Financial Institution Employees* and *Fall River Dyeing* confirm, *Garment Workers* does not go so far as to hold that a properly designated union's continuing majority support is always open to question or that it is always a violation of § 8(a)(2) for an employer to continue to deal with a properly designated union which thereafter loses majority support. To the contrary, *Garment Workers* leaves the Board free to adopt temporal limitations—like the contract bar rules—on when a properly designated union's majority status is subject to redetermination and to require employers to recognize and bargain with such unions during "closed" periods without regard to the union's actual level of employee support. *A fortiori,* the Board may, consistent with *Garment Workers,* impose the temporal limit at issue here on the employer privilege to refuse to bargain on the basis of an asserted good faith *doubt* of a properly designated union's continued majority support.

[10] *Chicago Tribune Co. v. NLRB,* 965 F.2d 244 (7th Cir. 1992), on which Auciello relies for its analysis of *Garment Workers,* is on its face fully consistent with our understanding of this Court's § 8(a)(2) jurisprudence. The Seventh Circuit's premises in *Chicago Tribune* were that the company refused to bargain on the basis "that the union no longer represented a majority of the workers", and that in fact "the union had lost the support of the workers." 965 F.2d at 248, 250. Thus, the Seventh Circuit did not view that case as one in which the employer had raised only a good faith doubt of majority support, but rather as one in which, as in *Bernhard Altmann,* the company raised—and proved—a union loss of majority support.

CONCLUSION

For the above stated reasons as well as those stated by the brief for the National Labor Relations Board the decision below should be affirmed.

Respectfully submitted,

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